92-2058 (3)

No. _____

In The

Supreme Court of the United States

October Term, 1992

HAWAIIAN AIRLINES, INC.,

Petitioner,

v.

GRANT T. NORRIS,

Respondent,

and

PAUL J. FINAZZO, HOWARD E. OGDEN, and HATSUO HONMA,

Petitioners,

v.

GRANT T. NORRIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court For The State Of Hawaii

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Hawaii Supreme Court correctly held that an airline employee's claim, alleging that the airline fired him in violation of the public policy of the State of Hawaii when he reported the airline's dangerous maintenance practice to the Federal Aviation Administration ("FAA"), did not depend on an interpretation of the employee's collective bargaining agreement ("CBA"), and therefore was not preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, and was not subject to adjudication by an arbitrator who ordinarily has no expertise in and cannot consider public interest or determine violations of law or public policy.

LIST OF INTERESTED PARTIES

Parties other than the corporations identified in the Petition are listed in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

TABLE OF AUTHORITIES – Continued

JURISDICTION

This Court does not have jurisdiction to consider the Petition because the Hawaii Supreme Court's judgments are not "final judgments or decrees" as required by 28 U.S.C. § 1257(a). The Hawaii Supreme Court's judgments reverse orders dismissing only some of the claims brought by Respondent Grant T. Norris ("Norris") and remand those matters for trial. Other counts were not in issue on the appeal, which was based on a certification of the appealed rulings as final pursuant to Rule 54(b) of the Hawaii Rules of Civil Procedure. Petitioners had moved unsuccessfully for dismissal of the other counts on the same jurisdictional ground that led to the dismissal of the counts in issue on the appeal. Record on Appeal in *Norris v. Hawaiian Airlines, Inc.* ("R."), vol. 5, at 1-136. Because these other counts will be tried regardless of what happens with respect to the matters that are the subject of this appeal, federal issues may be raised in a subsequent appeal from any trial ruling on those other counts. Thus, it will be only after the proceedings in the trial court are completed that all of the federal issues in this case will be decided and framed for possible review by this Court. At this point, notwithstanding how the jurisdictional issue is handled on this appeal, it is impossible to say whether new twists on the jurisdictional issue may be raised with respect to the other claims that are not addressed on this appeal. It would be premature for this Court to consider selected rulings regarding federal issues at this time.

The general rule is that all federal issues in a particular case should be reviewed on certiorari at the same time. Section 1257(a) provides, in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

In interpreting the requirement of a final judgment:

> The Court has noted that "[c]onsiderations of English usage as well as those of judicial policy" would justify an interpretation of the final-judgment rule to preclude review "where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has been adjudicated by the highest court of the State."

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 (1975) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

Although the Court has acknowledged a "limited set of situations in which [the Court] has found finality as to the federal issue despite the ordering of further proceedings in the lower state courts," *O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982), the Court has not expanded this limited set to include circumstances in which additional potentially appealable federal issues remain to be decided.

Thus, in *Cox Broadcasting Corp.*, the Court said:

> There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 USC § 1257 [28 USCS § 1257] and has taken jurisdiction without awaiting the

> completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of *other federal questions that might also require review by the Court at a later date*, and immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and of delayed justice," [citation omitted] as well as precipitate interference with state litigation.

420 U.S. at 477-78 (emphasis added).[1]

Under the circumstances of the present case, neither the final judgment rule nor the justification behind the limited exceptions to the rule previously recognized by the Court would be served by granting the Petition.

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[1] In *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), this Court found a Kentucky Court of Appeals judgment "final" for purposes of 28 U.S.C. § 1257, explaining:

> [I]t finally disposed of the federal pre-emption issue; a reversal here would terminate the state-court action; and to permit the proceeding to go forward in the state court without resolving the pre-emption issue would involve a serious risk of eroding the federal statutory policy of " 'requiring the subject matter of respondents' cause to be heard by the . . . Board, not by the state courts.' "

Id. at 497 n.5 (citations omitted). Here, by contrast, a ruling by this Court could not terminate the state court action. Petitioners did not obtain complete summary judgment against Norris, nor have Petitioners had the opportunity to have the highest state court review the lower state court's denial of their motion to dismiss Norris's other claims.

Norris presents the following discussion, however, in the event the Court does consider the Petition on its merits.

STATEMENT OF THE CASE

This is a wrongful discharge case. Norris was a licensed aircraft mechanic hired by Petitioner Hawaiian Airlines, Inc. ("HAL") on February 2, 1987. *Norris v. Hawaiian Airlines, Inc.*, 842 P.2d 634, 637 (Haw. 1992). Norris's license from the FAA carried an Airframe and Powerplant rating that gave him the authority to approve and return to service an aircraft after making, supervising, or inspecting certain repairs. *Id.* *See also* 14 C.F.R. §§ 65.85, 65.87. A mechanic approves the aircraft by signing the maintenance record. 14 C.F.R. § 43.9(a)(4). However, the mechanic may not approve for service any aircraft or part if the repair is not in accordance with the manufacturer's instructions or specifications or if the repair does not otherwise conform to the Federal Aviation Regulations ("FAR's"). 14 C.F.R. §§ 43.9, 43.13. This restriction is stated on the back of every mechanic's license. If a mechanic makes a fraudulent or intentionally false entry in a record or report required by the FAR's, the FAA may suspend or revoke the mechanic's license, or assess a civil fine. 49 U.S.C. §§ 1429, 1471; 14 C.F.R. § 43.12.

On a routine preflight inspection of one of HAL's DC-9 aircraft, Aircraft 70, in the early morning of July 15, 1987, Norris noticed that one of the main landing gear tires was worn. 842 P.2d at 638. The tire and bearing were removed, and Norris and the other mechanics present

saw that the axle sleeve underneath, which normally has a mirror-smooth surface, was scarred and grooved, with gouges and burn marks clearly visible. *Id.*

Norris and other mechanics who saw the sleeve thought it was unsafe and needed to be changed at once. *Id.* Justin Culahara, the line manager, however, ordered the mechanics to hand sand the sleeve and simply put a new bearing and tire over it. *Id.* Culahara knew the plane was to begin its schedule of flights very soon, with passengers on board. R., vol. 3, at 288-302 ¶ 12. *See also* R., vol. 27 (Deposition of Thomas Sealy, vol. I, Jan. 9, 1990, at 137-41).

When Norris was about to leave at the end of his shift, Culahara ordered him to "sign off" the tire change, thereby certifying that the repair had been performed satisfactorily. 842 P.2d at 638. *See also* 14 C.F.R. § 43.9(a)(4). Norris refused, saying that the sleeve was unairworthy and unsafe. Culahara told Norris to sign the work order or be fired. 842 P.2d at 638. Norris refused to sign. Culahara suspended Norris on the spot, pending a termination hearing. *Id.* Aircraft 70 made its scheduled flight carrying passengers. *Id.*

When Norris returned home, he contacted the FAA to say that there was a problem with the HAL aircraft that he had serviced. *Id.* In the afternoon, after Culahara had been relieved of his shift, Norris returned to the office of Norman Matsuzaki, the Assistant Director of Base Maintenance, and Culahara's superior, to tell him what had happened. R., vol. 3, at 288-302 ¶ 18. Norris mentioned his contact with the FAA. Matsuzaki then chased Norris from his office after assuring Norris that Norris was

"gone" no matter what Norris or the union said in Norris's defense. *Id.* ¶ 19.

Norris invoked the grievance procedure outlined in Articles XV and XVI of the CBA between the International Association of Machinists and HAL. 842 P.2d at 638. The CBA provided for an employee to be discharged or disciplined only for just cause. The CBA also stated that an aircraft mechanic "may be required to sign work records in connection with the work he performs." R., vol. 5, at 42 and Appendix F to Petition.

On July 31, 1987, Norris's termination hearing was held pursuant to Article XV of the CBA. 842 P.2d at 638. Matsuzaki presided over the hearing and ruled that Norris was terminated for "insubordination." *Id.*

Norris filed a grievance regarding his termination, seeking reinstatement and back pay. Norris's union representative referred the grievance for a Step 3 hearing pursuant to the CBA. Before the hearing was conducted, however, HAL's Vice President of Maintenance and Engineering, Howard E. Ogden, wrote a letter dated September 10, 1987, offering to "mitigate" Norris's punishment to suspension without pay, but explicitly warning that "any further instance of failure to perform your duties in a responsible manner" could be punished by discharge. *Id.* at 638-39. HAL wrote to the union representative and stated that HAL's action "negates the need" for the Step 3 hearing. R., vol. 3, at 300. Norris refused to accept the reinstatement offer under the circumstances. He filed this action in state court on December 8, 1987. 842 P.2d at 639. No Step 3 hearing was held.

On August 3, 1987, after Norris had been terminated, he went back to the FAA and gave the federal agency the details of what had happened on the evening/early morning of July 14/July 15, 1987, including the location of the damaged axle sleeve. The FAA seized the axle sleeve on August 4, 1987, and began a comprehensive investigation into how long that sleeve had been on the plane and how many times the sleeve had been signed off while it was damaged. R., vol. 17 (Deposition of Richard S. Teixeira, Records of Federal Aviation Administration, Dec. 6, 1989). *See also* 842 P.2d at 638.

On March 2, 1987, the FAA proposed a civil penalty of $964,000.00 against HAL on the basis of 958 flights the aircraft had made with the damaged sleeve. R., vol. 3, at 80-81. The FAA inspector who seized the sleeve found it to be damaged beyond allowable repair limits set out in the manufacturer's maintenance manual. *Id.*

The FAA proposed to revoke the FAA license of Culahara, the line manager who had suspended Norris. *Id.* at 83.

In September, 1987, the FAA broadened its investigation to include other HAL DC-9 Series 50 aircraft. *Id.* at 89-91. The FAA notified HAL that it intended to inspect the axle sleeves of two other aircraft, Aircraft 68 and 69, on September 21, 1987. *Id.* Before the inspection could take place, however, an FAA inspector caught HAL personnel removing the sleeves on those aircraft. *Id.* He ordered the sleeves made available to him. *Id.* HAL, however, did not turn over the sleeves; it told the FAA that it had "misplaced" or "lost" at least six of eight sleeves on the two aircraft. *Id.* The FAA then received

information indicating that the sleeves from Aircraft 68 and 69 were also damaged beyond allowable limits. *Id.* The FAA issued a formal Order of Investigation on April 13, 1988, to determine the facts surrounding the disappearing axle sleeves. *Id.*

On February 10, 1989, the FAA issued the "Woodruff Report," a report containing the findings and conclusions in accordance with the Order of Investigation. R., vol. 9, at 341-97. The Woodruff Report concluded that there was "evidence of actions on the part of certain HAL middle management personnel to intentionally take the sleeves as soon as they were removed from the aircraft." *Id.* at 380. The FAA questioned "whether HAL middle managers would take such action on their own volition." *Id.* at 383. Ultimately, HAL and the FAA reached a compromise, with the payment by HAL of $360,000 resolving all pending charges. R., vol. 27 (Deposition of Stephen Thompkins, vol. 2, Aug. 1, 1990, at 308-19, Exhibit 9). *See also* HAL's Answering Brief filed June 10, 1991, at 19-20 n.6.

Norris's suit against HAL alleges that his discharge was in violation of clear mandates of public policies as articulated in the Federal Aviation Act and the Hawaii Whistleblowers' Protection Act, Haw. Rev. Stat. §§ 378-61 to 378-69. R., vol. 1, at 1-11. Count I of the Complaint includes the following allegation:

> 22. The foregoing acts constituted a discharge in violation of the public policy expressed in the Federal Aviation Act and the Federal Aviation Regulations, because they had the intent or the effect of allowing unsafe aircraft to carry passengers and of intimidating FAA-licensed mechanics to ignore their obligations to the flying public in order to keep their jobs.

HAL removed the entire case to federal district court, R., vol. 1, at 48-91, where the question of whether federal labor law preempted Norris's claims was litigated. R., vol. 7, at 71-75. The federal court dismissed Count V of Norris's Complaint on the ground that it was preempted by federal labor law and remanded the remaining claims to state court. R., vol. 30, at 196-242. HAL moved for reconsideration, which the federal district court denied, saying:

> The question under *Lingle* is whether a claim for wrongful discharge in violation of public policy is a claim derived from or dependent on the terms of a collective bargaining agreement. To state a claim for wrongful discharge in violation of public policy, an employee must show (1) that there is a clear mandate of public policy; and (2) that his discharge was motivated by reasons that contravene a clear mandate of public policy. *See generally Parnar*, 652 P.2d at 631-32; *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash. 1984) *(en banc)*. Once the employee has made this threshold showing, the burden shifts to the employer to show that the discharge was for reasons other than those alleged by the employee. *Thompson*, 685 P.2d at 1089.

This cause of action, like the cause of action in *Lingle*, does not require an interpretation of the collective bargaining agreement. The public policy is not found in the collective bargaining agreement but in "a constitutional, statutory, or regulatory provision or scheme." *Parnar* at 631.

> The motivation of the employer is a "purely factual" question. *Lingle*, 108 S. Ct., at 1882. To defend against the claim an employer must show that it was not motivated by a reason that contravenes public policy: "this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement.["] *Id.* I therefore conclude that Norris's claim that HAL discharged him in violation of public policy is not preempted under *Lingle*.

R., vol. 3, at 1-136 (Exhibit I at 20-21).

In state court, HAL moved to dismiss Norris's claims on the ground that the state court lacked subject matter jurisdiction over them. The lower state court granted that motion as to Count I but not as to other counts. (Count I was based on *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Haw. 1982), which held that it was against the public policy of the State of Hawaii for an employer to fire an employee for reporting violations of law.) The state court certified its orders as final under Haw. R. Civ. P. 54(b). 842 P.2d at 639. Norris appealed from the judgment dismissing Count I against HAL and also appealed from rulings in favor of Paul J. Finazzo, Howard E. Ogden, and Hatsuo Honma. R., vol. 29, at 117-26. These three individuals were defendants in Civil No. 89-2904-09, with which Norris's case against HAL had been consolidated. R., vol. 18, at 407-08. The rulings in favor of Messrs. Finazzo, Ogden, and Honma had dismissed Counts I and II, both of which alleged violations of public policy.

On appeal, the Hawaii Supreme Court retained jurisdiction over Civil No. 89-2904-09 but determined that the state courts had no jurisdiction over Civil No. 87-3894-12

(Norris's case against HAL). 842 P.2d at 639 n.7. HAL then attempted to persuade the federal district court to reconsider its 1988 decision to remand the case. The federal district court denied HAL's repeated reconsideration motions and granted HAL leave to seek appellate permission to take an interlocutory appeal. The Ninth Circuit declined to permit an interlocutory appeal or to clarify the decision denying leave to file an interlocutory appeal. R., vol. 35 (Affidavit of Jennifer Cook Clark, submitted by way of supplemental Record) (Exhibits L, N, R, T). The state court ultimately reinstated orders and entered a reinstated judgment, from which Norris appealed. The Hawaii Supreme Court reversed the lower state court's judgments in *Norris v. Finazzo* and in *Norris v. HAL*. *See* 824 P.2d 634 (1992) and Appendices B and C to the Petition.[2]

ARGUMENT

I. Summary of Argument.

Petitioners frame the issue before this Court as being whether the preemption analysis in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), which

[2] The Petition complains that the Hawaii Supreme Court did not cite or follow *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.), *cert. denied*, 498 U.S. 958 (1990), "[d]espite extensive briefing by both parties" of *Grote*. So that there will be no misunderstanding, Norris explains that his "extensive briefing" of the case consisted of discussion as to why *Grote* was inapplicable or, in the alternative, distinguishable, as more fully discussed below.

analyzed preemption under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, applies in the RLA preemption context. Petitioners argue that it does not, and that the Hawaii Supreme Court, in applying *Lingle*, is in conflict with several decisions of the United States Courts of Appeals. Norris submits, first, that the applicability of *Lingle* need not even be considered to sustain the Hawaii Supreme Court's decision, which is entirely consistent with this Court's subsequent decision in *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299 (1989) *("Conrail")*. *Conrail* provides that a dispute between an employee and employer is a "minor" dispute that must be arbitrated under the RLA only if the employee's claim can be "conclusively resolved" by interpreting the CBA. Norris's claim cannot be "conclusively resolved" under the CBA.

Norris further submits that the Hawaii Supreme Court's use of *Lingle* was appropriate in any event, and that its decision can be squared with the federal decisions cited by Petitioners.

II. While Petitioners Frame the Issue Raised by Their Petition as Being Whether *Lingle* Applies to RLA Preemption Issues, Application of *Lingle* is Not Necessary to Sustain the Hawaii Supreme Court's Decision, which Finds Support in *Conrail*.

Petitioners' focus on *Lingle* as the linchpin of the Hawaii Supreme Court's decision is misplaced. Despite the Hawaii Supreme Court's discussion of *Lingle*, that case is not essential to the Hawaii Supreme Court's decision. Instead, the decision is fully supportable, without

regard to *Lingle*, under *Conrail*, a case dealing with the RLA and decided after *Lingle*, but never mentioned in the Petition.

Norris's public policy claim does not require any interpretation of the CBA at all. The claim raises the issue of whether HAL fired Norris in retaliation for his reporting of dangerous maintenance practices to the FAA. Any such discharge would have violated Hawaii's public policy, as stated in *Parnar*. Whether, as Petitioners claim, Norris was "insubordinate" would not "conclusively resolve" Norris's claim. Norris's claim turns on whether Petitioners were motivated by an intent to get rid of Norris because Norris was reporting shoddy maintenance practices.

As this Court noted in *Conrail*, the RLA governs disputes that can be classified as either "major" disputes or "minor" disputes. A "major" dispute is a dispute over the formation of a CBA or efforts to secure a CBA. A "major" dispute is resolved through collective bargaining or mediation. If those methods fail, the parties may resort to the use of economic force. *Conrail*, 491 U.S. at 302-03. A "minor" dispute is a dispute over the meaning or application of a particular provision in a CBA in the context of a specific situation. A "minor" dispute is resolved through compulsory and binding arbitration. *Id.* at 303. The dispute is "minor" if the employer's action is "arguably justified" by the CBA, but it is "major" if the employer's claims of justification under the CBA are "frivolous or obviously insubstantial." *Id.* at 307. The "distinguishing feature" of a "minor" dispute is that "the dispute may be conclusively resolved by interpreting the existing agreement." *Id.* at 306.

Petitioners agree that no "major" dispute is involved here, 842 P.2d at 641, but they contend that Norris's public policy claim raises a "minor" dispute because it falls within Articles IV and XVII of the CBA. Petitioners are incorrect.

Article IV provides that an aircraft mechanic "may be required to sign work records in connection with the work he performs." *See* Appendix F to the Petition. But this provision cannot "completely resolve" Norris's claim, as it does not speak to Norris's claim that Respondents' actual reason for terminating him was that he had reported HAL to the FAA, rather than that he had failed to sign a work record. As the Hawaii Supreme Court said, "[D]efendants do not suggest that a retaliatory discharge is sanctioned or justified by a provision in the agreement nor do they point to any part of the CBA which demonstrates that the carrier and union have agreed on standards relevant to Norris's situation." 842 P.2d at 644. Norris's claim turns on Petitioners' allegedly retaliatory animus in firing him. What the parties did and what motivated them is not ascertainable by reference to the CBA.[3]

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[3] Petitioners state at page 17 of their Petition that the Hawaii Supreme Court decision requires a jury to interpret the CBA to determine whether Norris was discharged or merely suspended. This is not true at all. The hearing report contained in Appendix G to the Petition specifically concludes, "Mr. Grant Norris terminated as of this day, August 3, 1987, for insubordination." Thus, Petitioners' own document states unequivocally that a termination occurred. Following receipt of this report, Norris left Hawaii and moved to California to attend nursing school "because [he] figured that [his] career in the airline industry had ended." R., vol. 3, at 388-302, ¶ 24. It is true

Article XVII is similarly inapplicable. Article XVII refers to employee safety and sanitation and states, "An employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law shall not warrant disciplinary action." Article XVII does not concern the safety of the flying public, which Norris was trying to protect. The flying public was not a party to the CBA and simply is not considered in the CBA at all. Article XVII speaks of physical examinations for employees, clean and dry washroom floors, lights, employee lockers, unsafe and unsanitary working conditions, protective apparel, rain repellant garments, boots, ear muffs, and safety goggles. It does not mention, much less encompass, FAR's or other aviation safety issues. Therefore, Article XVII cannot be said to provide the framework for determining Norris's claim that he was fired in violation of public policy when he refused to participate in and instead reported dangerous aircraft maintenance practices. Certainly Norris's

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that, after Norris had relocated and begun preparing for a new career, he received a letter from Howard Ogden "mitigat[ing] the punishment imposed on [him] from discharge to suspension without pay," but warning that "any further instance of failure to perform [his] duties in a responsible manner will result in consideration of more severe disciplinary action to include discharge." *Id.* and Appendix H to Petition. However, nothing in the CBA relates to whether such a "mitigation" has any effect at all if the employee has already moved out of the state and begun a new career, or whether a "mitigation" may threaten discharge if there is a "further instance" of irresponsibility, such as a further report to authorities of unsafe maintenance practices. Thus, the jury will not have to refer to the CBA at all in considering this "mitigation."

claim cannot be "conclusively resolved" by reference to Article XVII.

Nor would it make sense for a public policy issue to be resolved through a grievance procedure or through arbitration. Arbitrators do not make public policy. While an arbitrator may be experienced in labor law issues, such experience provides no expertise in public policy, which is typically left to courts, legislatures, and elected officials. If arbitrators could determine public policy, then the policy would not be public, for arbitration is normally a private matter in which the public has no say. Thus, Petitioners' argument at page 16 of the Petition that they have expert testimony establishing that the CBA does indeed cover Norris's public policy claim is unpersuasive. Public policy is not a subject for CBA's or for expert witnesses.[4]

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[4] The expert's testimony was not in the Record when the trial court entered its original ruling in HAL's favor in 1989. This ruling was the basis for other rulings. (The testimony was placed in the case files subsequently. R., vol. 27, Deposition of Ted T. Tsukiyama.) *See Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909 (5th Cir.), *cert. denied*, 113 S. Ct. 98 (1992) (on appeal from summary judgment ruling, party may not rely on materials not brought to lower court's attention in connection with ruling). In addition, there is no reason that any court should rely on an expert with respect to matters of law. The courts are the ultimate authorities on matters of law. Were this case to go to trial, the expert's opinion would not even be admissible. An expert witness may testify in the form of an opinion only if his "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Haw. R. Evid. 702. The expert testimony Petitioners rely on would not help the trier of *fact* to determine any fact in issue. *See Stewart v. Brennan*, 748 P.2d 816 (Haw. App. 1988). *See also Specht*

Faced with a CBA that does not address Norris's public policy claim, Petitioners conspicuously ignore the statement in *Conrail* that arbitration under a CBA will be required only if a dispute can be "conclusively resolved" by reference to the CBA. Instead, Petitioners argue that the Hawaii Supreme Court erroneously relied on *Lingle*. But if the Hawaii Supreme Court's decision is consistent with *Conrail*, a later case that deals specifically with the RLA, then it is difficult to see why this Court should grant certiorari to resolve the issue of whether *Lingle* applies. In fact, the Hawaii Supreme Court expressly said that the holding in *Lingle* "is virtually indistinguishable from the Supreme Court's reading of § 153 First (i) of the RLA in *Consolidated Rail.*" *Norris*, 842 P.2d at 643.

Of course, Norris submits that, as he successfully argued to the Hawaii Supreme Court, *Lingle*, although decided in the LMRA context, does indeed provide guidance in this case. *Lingle* held that Section 301 of the LMRA did not preempt an employee's claim that he had been fired in violation of Illinois law in retaliation for filing a worker's compensation claim. The Court noted that the case turned on "purely factual questions" pertaining to "the conduct of the employee and the conduct and motivation of the employer," and that "this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement." 486 U.S.

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v. Jensen, 853 F.2d 805 (10th Cir. 1984) (lawyer expert should not be permitted to usurp court's function by directing jury's understanding of legal standards); *United States v. Zipkin*, 729 F.2d 384 (6th Cir. 1984) (prejudicial error to allow testimony of bankruptcy judge on matters of law); *Marx & Co. v. Diner's Club*, 550 F.2d 505 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977).

at 407. The Court held that "as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement." *Id.* at 410. The dispute did not have to be arbitrated because it did not require construing a CBA. *Id.* at 413.

The historical development of RLA preemption establishes that LMRA preemption principles provide guidance in the RLA context. Section 301 of the LMRA was first linked to the RLA in *International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 691-92 (1963), which involved the RLA and which recognized that the CBA in question, like an LMRA contract, was a federal contract governed by federal law and enforceable in federal courts. In 1972, in *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 323 (1972), this Court, reviewing an RLA case, applied concepts developed under Section 301 of the LMRA. Similar questions often arise in the LMRA and RLA contexts. Thus, for example, *Lingle* itself, decided in the LMRA context, discusses many of the same issues discussed several years earlier in the RLA context in *Puchert v. Agsalud*, 677 P.2d 449 (Haw. 1984), *appeal dismissed for want of substantial federal question*, 472 U.S. 1001 (1985). *Puchert*, like *Lingle*, involved a complaint of a discharge in retaliation for the filing of a worker's compensation claim, and, like *Lingle*, found the claim not preempted by the federal labor laws. In light of the similarity of issues raised in the LMRA and RLA contexts, it makes sense to look to LMRA preemption cases for guidance in the RLA context. It may well be this similarity that produced what the Hawaii Supreme Court found to be the near identity of the *Lingle* and *Conrail* formulations.

III. There is No Conflict Between the Decision in *Norris* and the Decisions of the United States Courts of Appeals Relied on by Petitioners.

Petitioners are incorrect in arguing that the Hawaii Supreme Court's decision is in conflict with decisions from the Fourth, Sixth, and Ninth Circuits. The facts leading to the decisions on which Petitioners rely are distinguishable from the facts in issue here, so that the Hawaii Supreme Court's decision may be squared with those decisions.

The Fourth Circuit decision on which Petitioners rely is *Lorenz v. CSX Transportation, Inc.*, 980 F.2d 263 (4th Cir. 1993), a two-to-one decision. Lorenz filed a defamation lawsuit, claiming that he was defamed when his employer posted a notice on the office bulletin board stating the rescheduled date of a hearing on charges against Lorenz of insubordination and removal or theft of company property. The hearing itself was conducted pursuant to the CBA, and Lorenz was found guilty. Pursuant to the CBA, Lorenz appealed, but he was unsuccessful. Lorenz then appealed to a public law board designated to arbitrate the matter in accordance with the provisions of the RLA, and the disciplinary action against Lorenz was reduced. In the meantime, Lorenz filed his defamation lawsuit, which was removed from state court to federal court. Because the defamation claim challenged the employer's handling of a matter governed by the CBA, the Fourth Circuit said that the issue of whether the employer had acted wrongfully had to be determined under the CBA:

> Lorenz's claim is grounded in state law and, in effect, challenges CSX's conduct in the application of the investigatory procedures required by the BMWE [the CBA]. The defamation claim arises from the issuance of a notice incident to the grievance process under the BMWE. The BMWE required the notice to be given before an employee could be disciplined. The allegedly defamatory statement is, facially, a simple recitation of the charges against Lorenz and notice of a hearing which CSX was required to hold. This act was inextricably intertwined with the grievance procedures mandated by the BMWE and this dispute cannot be settled without reference to the BMWE and the grievance procedures mandated by it.

Id. at 268.

Lorenz is distinguishable from *Norris*. Unlike Norris's public policy claim, which turned on such purely factual issues as the employer's motivation, Lorenz's defamation claim turned on whether the employer was following the requirements of the CBA. If the CBA required the employer's actions, then the CBA would "conclusively resolve" the defamation claim. By contrast, no one is claiming that the CBA required Norris's termination. To the contrary, as noted above, Petitioners claim that Norris's termination was "mitigated" to a suspension. Moreover, the heart of Norris's claim is that Petitioners were motivated by a desire to penalize him for reporting violations of law, a factual matter that cannot be "conclusively resolved" by even the most comprehensive review of the CBA. Thus, *Lorenz* is distinguishable from this case, and the decision by the Fourth Circuit not to

apply *Lingle* to the situation before it is in no way inconsistent with the Hawaii Supreme Court's decision. The reasoning in the Norris decision suggests that the Hawaii Supreme Court, faced with the facts in *Lorenz*, would similarly have found the defamation claim preempted.

The Sixth Circuit decisions cited in the Petition are even more easily distinguished than the Fourth Circuit decision. Petitioners mischaracterize *Smolarek v. Chrysler Corp.*, 879 F.2d 1326 (6th Cir. 1989), as holding that "*Lingle* does not apply to RLA preemption analysis." Petition at 14. In *Smolarek*, the court applied the then-recent *Lingle* decision to hold claims of handicap discrimination not preempted by the LMRA. *Smolarek* did not address, much less distinguish, RLA preemption. In a footnote, *Smolarek* made a passing reference to *McCall v. Chesapeake & Ohio Railway Co.*, 844 F.2d 294 (6th Cir.), *cert. denied*, 488 U.S. 879 (1988), a case in which the Sixth Circuit held that the RLA preempted a state claim if resolution of the state claim would require the same factual inquiry as would be made by an arbitration board. However, *McCall* was decided before *Lingle* (although a rehearing was denied shortly after the date of the *Lingle* decision), and before *Conrail*. In its footnote in *Smolarek*, the Sixth Circuit did not, as Petitioners claim, cite *McCall* "as a case in which *Lingle*'s Section 301 preemption did not apply." Rather, the Sixth Circuit simply noted that *McCall* "did not involve the question of § 301 preemption." 879 F.2d at 1335 n.4. The Sixth Circuit did not take it upon itself to discuss whether the LMRA preemption analysis in *Lingle* applied to the RLA, as the issue was not before it and had not been addressed in *McCall*. To read into the footnote a

conflict with the analysis in the Hawaii Supreme Court's decision is to read something that is just not there.

Finally, Petitioners claim that the Hawaii Supreme Court is in conflict with Ninth Circuit decisions on the subject of RLA preemption. Petitioners cite two Ninth Circuit cases: *Hubbard v. United Airlines, Inc.*, 927 F.2d 1094 (9th Cir. 1991), and *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.), *cert. denied*, 498 U.S. 958 (1990). Neither case creates a conflict.

The employee in *Hubbard* alleged RICO violations (mail fraud and wire fraud) related to what she said was the defendants' defrauding of her by paying her less in disability payments than the CBA required. Obviously, her claim required interpretation of the CBA, which set forth the applicable benefits. Thus, her claim, unlike Norris's, was not independent of the CBA. Petitioners can give no reason for this Court to assume that, presented with the facts in *Hubbard*, the Hawaii Supreme Court would decide that case differently from the Ninth Circuit. Moreover, the Ninth Circuit, while noting that LMRA cases did not control because preemption was broader under the RLA, expressly noted that it would reach the same result under *Lingle* and other LMRA cases. There is, therefore, no reason to reconcile any alleged conflict between *Hubbard* and *Norris*.

Grote can similarly be reconciled with *Norris*. *Grote* involved a claim that an airline had forced a pilot to perjure himself in order to obtain medical certification. The airline's CBA dealt with the airline's "ability to require any of its pilots to maintain a current medical certificate." 905 F.2d at 1309. Thus, the pilot's claim

depended on whether the airline was acting within the scope of its authority as set forth in the CBA. Because the pilot's claim could be "conclusively resolved" by interpreting the CBA, it was deemed preempted. The Hawaii Supreme Court has agreed that claims that can be "conclusively resolved" by reference to a CBA are indeed preempted, so that there is no conflict between *Grote* and *Norris*.

Admittedly, *Grote*, in contrast to the Hawaii Supreme Court, rejected application of *Lingle* to the RLA context. However, because the analysis of Petitioners' authorities is in keeping with the analysis in *Norris*, this Court need not step in to address the applicability of *Lingle*. It appears that the federal circuits and state appellate courts are following the same analysis, whether purportedly following or rejecting *Lingle*.

As this brief is prepared, this Court is considering the certiorari petition in *Davies v. American Airlines, Inc.*, 971 F.2d 463 (10th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3481 (U.S. Dec. 22, 1992) (No. 92-1077). Although that case contained a footnote rejecting the statement in *Grote* that, as the Tenth Circuit put it, "the statutory, as opposed to contractual, origin of the RLA affects the inquiry into whether a claim requires CBA interpretation," *id.* at 467 n.5, rejection of *Grote* was neither necessary nor material to the result in *Davies*. *Davies* could have been decided exclusively under *Conrail*'s "conclusively resolved" requirement with the same result.

The same is true of *Maher v. New Jersey Transit Rail Operations, Inc.*, 593 A.2d 750 (N.J. 1991), which Petitioners claim is in conflict with federal decisions. *Maher*

applied *Lingle* and rejected application of the *Conrail* language providing that a dispute is a "minor" dispute subject to the grievance procedure if it is "arguably justified" by a CBA. The court in *Maher* appears to have overlooked the requirement in *Conrail* that a dispute is a "minor" dispute only if it can be "conclusively resolved" by interpretation of the CBA. *Conrail*, 491 U.S. at 305. If this "conclusively resolved" requirement is not met, the dispute is not a "minor" dispute that must be resolved under the grievance procedures set forth in the CBA. Even if the "conclusively resolved" requirement is met, a dispute may still fall outside the class of "minor" disputes unless the conduct in question is "arguably justified" by the CBA. But one need not reach the "arguably justified" issue if the "conclusively resolved" requirement is not met.

The claim in *Maher* was that an employer had fired the plaintiff in violation of state anti-discrimination and whistle-blower laws. Because the claim could not be "conclusively resolved" under the CBA, it did not present a "minor" dispute, regardless of whether the employer's conduct was "arguably justified" by the CBA. The result in *Maher* is consistent with this reading of *Conrail*, which makes reliance on *Lingle* unnecessary. Unless Petitioners are asking this Court to overrule the "conclusively resolved" requirement in *Conrail*, the authorities Petitioners rely on can be reconciled with *Norris*, *Davies*, and *Maher*, regardless of whether *Lingle* applies in the RLA context or not.

CONCLUSION

Although Norris submits that *Lingle* is indeed applicable in the RLA context, neither the Hawaii Supreme Court's decision nor any other decision that finds independent claims not preempted by the RLA requires application of *Lingle*. The Hawaii Supreme Court's decision may be sustained under *Conrail*, which requires that, for the RLA to preempt a claim classifiable as a "minor" dispute, the claim must be capable of being "conclusively resolved" by interpretation of a CBA. Application of this "conclusively resolved" requirement to *Norris*, to the authorities *Norris* relies on, and to Petitioners' authorities renders all of those authorities reconcilable. Petitioners are straining to manufacture a conflict not material or necessary to the Hawaii Supreme Court's decision.

Accordingly, the Court should deny the Petition for a Writ of Certiorari.

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Respectfully submitted,

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